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ABSTRACT

When the Freedom of Information Act of 1966 was amended, despite President Ford's veto, expectations for improved access to federal agency records were high. This report details the manner in which information seekers, particularly members of the media, were deterred from using the act by nine loopholes in the 1966 law. In addition, the process whereby representatives of the media, historians, and other concerned groups lobbied for change is described. Congressional amendments made in 1974 produced two major substantive changes in the original law--"in camera" review of the classification of information as restricted and sanctions against bureaucrats who capriciously withhold information. (KS)

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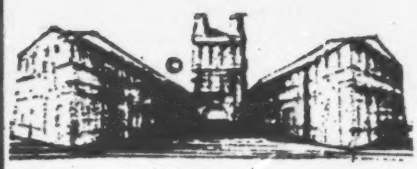

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FREEDOM OF INFORMATION CENTER REPORT NO. 337

THE FOI ACT GETS TEETH

This report was written by EDWARD KARAM, an M.A. candidate in the School of Journalism.

The nine exemptions of information from disclosure under the 1966 Freedom of Information Act often served as bones of contention between information-seekers and government agencies. Government agencies in many cases read the exemptions so broadly as to effectively flout the intentions of the act.

As a result, as **FoI Report 303**[1] noted, the media were deterred from using the 1966 act because of the loopholes within the law and the time and expense involved in prosecuting cases for disclosure.[2]

The nine exemptions covered matters:

> (1) Specifically required by executive order to be kept secret in the interest of the national defense or foreign policy;
> (2) Related solely to the internal personnel rules and practices of any agency;
> (3) Specifically exempted from disclosure by statute;
> (4) Trade secrets and commercial or financial information obtained from any persons and privileged or confidential;
> (5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency;
> (6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
> (7) Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party;
> (8) Contained in or related to examination, operating or condition reports prepared by, or behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions, and;
> (9) Geological and geophysical information and data (including maps) concerning wells. [3]

In cases involving disputes over one of the nine exemptions, the act says "the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action." [4]

Although the battle between information-seekers and the government had been joined before 1973, the decision handed down by the Supreme Court in the case of **Mink v. Environmental Protection Agency (EPA)** in January, 1973, spurred Congress to act on proposed revisions of the 1966 act.

This report will examine the efforts to revise the 1966 act from the **Mink v. EPA** decision to the implementation of the amended act in February, 1975. It will also examine important moves made by the Justice Department both for disclosing and withholding information during that time.

Charges of Noncompliance

Federal agencies had been charged so many times with bureaucratic foot-dragging, obeying the letter but not the spirit of the law and deliberate noncompliance, that in 1972 the House Government Information and Foreign Operations Subcommittee (known also as the Moorhead Committee, for its chairman, Rep. William Moorhead, D-Pa.) held hearings on the matter.

James Kronfeld, counsel to the Moorhead Committee, later said:

> Many agency officials feel that their own regulations are superior to the U. S. Code. I will often call an agency and say I saw a regulation printed in the **Federal Register**, and it is a regulation which contravenes the Freedom of Information Act. They say, well, that's our regulation. Some of the agency officials just don't understand that regulations are not the law; that the Code is the law . . . . These individuals view information as a capital asset . . . and they hate to disburse their capital by releasing it. [5]

Stephen Gillers, a New York lawyer and author, described a reporter's plight in trying to obtain information from a Department of Health, Education and Welfare (HEW) publication:

> After much stalling on HEW's part, and after he threatened to go to court under the act, he finally got HEW to agree to release the series (of publications containing the information sought), but at the same time that they did so they began to omit the information he wanted from that series. He had to go about looking for where the information was now located and to try to get that new publication. [6]

Specific methods of noncompliance charged to agencies have included levy of exorbitant copying and searching fees, delays in replying to requests, and the mingling of unclassified material with classified material in a single folder

Summary: When the Freedom of Information Act was amended over President Ford's veto, expectations for improved access to federal agency records were high. Some of that optimism was justified, but serious problems remain.

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to prevent the release of the material under claims of national security.

Robert Saloschin, attorney for the Justice Department and chairman of its Freedom of Information Committee, contends, however, that "such instances are rare":

> Less than ideal compliance has various causes. It is often due to organization problems, changes in structure or personnel, or the fact that an agency does not have the money or the qualified staff to handle its freedom-of-information work load on top of its main mission and regular functions. [7]

The Moorhead Committee's hearings during the summer of 1972, however, confirmed the allegations of non-compliance and abuse of the exemptions by federal bureaucrats.

Mink v. EPA

Despite the findings of the Moorhead Committee, congressional action was hanging fire when the Supreme Court ruled on January 22, 1973, in the case of **Mink v. EPA**. The case was the only suit brought under the 1966 Freedom of Information Act that ever reached the high court; the court's decision pinpointed several shortcomings of the act and laid blame for the act's inefficacy at the halls of Congress. The case became a cause celebre among critics of the act.

The **Mink** case involved an attempt by 33 U. S. representatives to see some classified documents that certain government agencies had prepared on the advisability of underground nuclear testing on Amchitka Island, Alaska, in November, 1971.

The representatives, led by Rep. Patsy Mink (D-Hawaii), were concerned about the effects of the testing on Alaskan wildlife and about possible radioactive contamination of North Pacific and Bering Sea fishing sites.

Rep. Mink also worried that an underground nuclear blast might trigger an earthquake like the one that hit Alaska in 1964. The added danger to Hawaii and coastal California was a tsunami, a large tidal wave caused by shifting ocean floors. [8]

On July 26, three days before Congress was scheduled to vote on appropriations for the test, the Washington **Evening Star** printed a story that said that five government agencies had filed unfavorable reports on the planned testing, while only the Atomic Energy Commission (AEC) and the Defense Department supported its continuance. Apparent governmental unanimity of opinion was a facade.

Although Rep. Mink attempted to obtain the reportedly unfavorable reports before Congress voted on appropriations for the test, all the agencies denied her requests to see them. [9]

Congress appropriated the money and the test took place as scheduled; nevertheless, Mink and 32 other congressmen sued under the FoI Act to get the reports. They . . .

> . . . hoped that ultimately a favorable disposition of the case would put new teeth into the 1966 Act, which generally requires the disclosure of government information but exempts some data from mandatory release on national security grounds. These exemptions have been interpreted so broadly by the Executive Branch as to render the Act almost meaningless. [10]

The federal district court sided with the Nixon administration, agreeing that an affidavit that had been filed by Undersecretary of State John N. Irwin II exempted the documents under the first exemption, and that the documents also fell under the fifth exemption.

Mink et al. filed an emergency appeal with the Court of Appeals of the District of Columbia. The appeal covered five points.

The congressmen contended that classification of the documents according to Executive Order 10501, which established the classification system, did not conform to exemption 1; rather, a separate executive order had to be issued for each document.

The plaintiffs also contended that the act, though it limits public access to information by the nine exemptions, does not limit congressional access to the information, under section 522 (c) of the FoI Act.

A third point raised in the appeal was that

> the Executive had not sustained the burden placed on it by the FOIA to justify non-disclosure and that the trial court had not conducted the de novo hearing required by the Act . . . . We maintained that the obligation of the District Court was either to direct the disclosure of materials, or to examine them in camera and release the maximum information possible. [11]

The congressmen further contended that their suit was not prohibited by the separation-of-powers clause in the Constitution, as the government contended. Since no claim of executive privilege had been made to withhold the papers, Mink et al. said that no conflict existed between the two branches of government. The appeals court and the Supreme Court did not consider this issue.

Finally, the congressmen said that the district court had not looked into the facts thoroughly enough to determine the legality of the agencies' action. Unless the court held an in camera review of the documents, the government could withhold by signing an affidavit.

The court of appeals agreed that the Irwin affidavit was not sufficient to exempt the documents under exemption 1, since unclassified material might easily be inserted into a file with classified data. The classified data would then act as an umbrella, preventing disclosure of unclassified material merely by being attached to it.

The appeals court directed the district court to conduct an in camera review of the documents to protect the government from having classified interagency memoranda released, since it had found the government's proof for non-disclosure inadequate.

The government immediately asked the Supreme Court to review the appeals court's decision.

On January 22 the Supreme Court said (**Columbia Law Review**, 6-74) that documents classified under Executive Order 10501 fell under exemption 1 of the FoI Act. No separate executive order need be issued for each classification claim.

Furthermore, since material which falls under exemption 1 is sensitive, the court concluded (**Columbia Law Review**, 6-74) that

> in conducting a de novo review of the claim to exemption, the district court's duty is discharged upon completion of the single inquiry whether the information has in fact been classified pursuant to executive order.

The court suggested that alternative methods be used to determine the legitimacy of classification, short of in camera inspection. The ruling was 5 to 3, with Justice William

Rehnquist disqualifying himself.

Associate Justice Byron White said that Congress was to blame for not having given the citizens a stronger law. The opinion said that the executive branch had met its obligation to justify non-disclosure by filing an affidavit.

Associate Justice Potter Stewart's concurring opinion was to be oft-quoted by persons seeking revision of the act. He laid (Washington **Post**, 1-23-73) blame for the act's failure on the legislative branch, saying:

> Congress has conspicuously failed to attack the problem. It has built into the Freedom of Information Act an exemption that provides no means to question an executive decision to stamp a document secret, however cynical, myopic, or even corrupt that decision might have been.

Reaction to the **Mink** decision from both the press and the Congress was adverse. A Washington **Post** editorial (1-26-73) called it a "setback for the right to know." The implied power of the executive branch to wield its classification stamps "immune from public challenge or judicial review" was decried.

The **Columbia Law Review** (6-74) said:

> It may be the case, however, that the Court's suggested alternatives to in camera review for evaluating the merits of agency defenses will be ineffective means for reaching that end, as they invest in the agencies a faculty for circumventing the FOIA. A "representative" document selected by the agency may not be representative at all, and affidavits can easily misrepresent or distort issues of fact. . . . The FOIA is an attempt to curb the dominance of agency discretion by empowering the courts to review administrative determinations de novo, but in camera review may be the only sound method by which the agency's bona fides (good faith) can be tested. By encouraging alternative, inferior devices, **Mink** threatens retreat to past abuses.

The Moorhead Bill

On March 8, 1973, Rep. William Moorhead introduced (**Congressional Record**, 3-8-73) a bill entitled "The FoI Amendments of 1973." Sen. Edmund Muskie (D-Me.) simultaneously introduced the same bill in the Senate "with bipartisan cosponsorship."

Moorhead's amendments to section (a) of the FoI Act included the following provisions:

> —Agencies would be required to respond to requests for records which "reasonably describe (s) such records."
> —Agencies would be required to answer requests within 10 working days following their receipt.
> —Agencies have 20 days to respond to administrative appeal following denials.
> —The government would be required to pay "reasonable attorney fees and other litigation costs" if it loses a case.
> —Agencies would be required to file answers and other responsive motions to citizens' suits within 20 days after receipt, eliminating "repeated filing of delaying motions by the government to stall court consideration of FOIA cases as long as 140 days."

Moorhead, citing the adverse **Mink** decision, said that Congress had intended that **de novo** review as written into the 1966 act would permit courts to conduct **in camera** review

of an agency's records to determine whether or not they could be withheld under any of the nine exemptions.

Moorhead proposed the following amendments to section 552 (b), the exemption section:

> —Required disclosure of information about an agency's internal personnel practices so long as such disclosure would not unduly impede the functioning of the agency.
> —Under exemptions 6 and 7, the word "files" is changed to "records" to prevent mingling of releasable information in the files with other information.
> —Inclusion of a catalogue of information under exemption 7 which cannot be withheld.

Finally, a new section proposed by Moorhead, section 552 (d), requires agencies to furnish Congress annual reports on their records of administration of the act.

Moorhead reiterated the findings of his committee in 1972:

> Contrary to general opinion, much of the information being hidden by government agencies has little to do with hydrogen bombs, weapons systems, state secrets, or other sensitive types of classified data. . . . We found that a large number of government denials of information requested under the act involved matters connected with the day-to-day activities of domestic programs financed out of our tax dollars or to avoid embarrassing bureaucratic mistakes, scandal, maladministration or other actions directly contrary to the intent of Congress and the public interest.

Hearings on the Bill

During spring of 1973 hearings were held by three Senate subcommittees in joint session. They were the Judiciary's Subcommittee on Administrative Practice and Procedure and the Subcommittee on Separation of Powers, and the Government Operations Subcommittee on Intergovernmental Relations.

On April 12, consumer advocate Ralph Nader testified (Washington **Post**, 4-13-73) before the joint committees, urging that sanctions be adopted against bureaucrats violating the law. Federal law holds bureaucrats liable only for unauthorized release of information, not for unauthorized withholding, Nader said.

The subcommittees also heard a recommendation from John T. Miller Jr., chairman of the administrative law section of the American Bar Association (ABA), that judges be permitted **in camera** inspection of documents.

Jack Taylor, editor of the **Daily Oklahoman** and the Oklahoma City **Times**, testified (**Publisher's Auxiliary**, 11-24-73) that he had requested information and documents from the Defense Department and its branches more than 400 times. He said that 120 requests were denied, 100 were granted, 42 were partially granted, and 152 were pending.

Taylor listed the lack of **in camera** review, broad exemptions, long delays and excessive fees as four major weaknesses of the 1966 FoI Act.

The subcommittee hearings concluded June 26. On October 8 Sen. Edward M. Kennedy (D-Mass.), chairman of the Administrative Practice and Procedure Subcommittee, offered his own version of the Moorhead-Muskie proposal, S. 2543, which contained certain differences. The Kennedy bill was the one reported out, on May 16, 1974, without hearings.[12]

Other recommendations for revision came (**Editor & Publisher**, 12-1-73) from a report prepared by the Annual Chief Justice Earl Warren Conference on Advocacy in the United States that had been held in Cambridge, Mass., June 8-9, 1973.

The report, released on November 30, generally echoed the call for previously mentioned reforms, but also recommended establishment of a government agency responsible to Congress to review national security documents and report to Congress on classification abuse and the function of the FoI Act.

In a speech to a National Press Club gathering on December 13, 1973, Warren himself urged (**Editor & Publisher**, 12-22-73) reform to open up government files, saying, "It would be difficult to find a more efficient ally of corruption than secrecy. . . ."

Although 1973 was a year in which there was growing clamor for reform, heightened undoubtedly by the breaking Watergate scandals, congressional action on reform waited until 1974.

Media Victories

A victory for the media under the 1966 FoI Act occurred on June 6, 1973. U. S. District Court Judge Mitchell Cohen ruled (**Publisher's Auxiliary**, 7-10-73) that secret reports on the operation and conditions of New Jersey nursing homes had to be turned over to the Camden (N. J.) **Courier-Post**. The reports, which had been prepared by the Social Security Administration, covered fire safety, building evacuation plans, staff competency, and dietary services, among other things.

When the Social Security Administration refused to turn over the documents requested, the **Courier-Post**, a Gannett paper, sued HEW Secretary Caspar Weinberger.

Cohen ruled that the wide power of the HEW secretary to withhold documents "is inconsistent with the 'specific exemption' requirement of the Freedom of Information Act."

After turning over the records in August, HEW announced (Washington **Star-News**, 8-16-73) new policies for releasing information. Among the provisions were a 10-day limit on reply to initial requests, a 20-day limit on decision of appeals, review of denial by the head of the agency in question and by the HEW assistant secretary for public affairs, and a public identification of the types of records that HEW did not intend to disclose.

Another major media battle was won in October when, after receiving an unfavorable court ruling, the Justice Department decided to forego any appeal.

The case involved a suit by NBC newsman Carl Stern, who had been trying to collect data on FBI infiltration of leftist groups during the 1960's, with little success. Stern had been after the information since he reportedly saw (Kansas City **Star**, 2-2-72) a Justice Department document instructing FBI agents to mail anonymous letters urging colleges to "take decisive action against the New Left." The document was reportedly entitled Cointelpro-New Left, jargon for "Counterintelligence Program — New Left."

After no success on his own, Stern turned to Ralph Nader's Press Information Center, which had been jointly founded by the Center for the Study of Responsive Law and the National Press Club. The Press Information Center filed suit on Stern's behalf on January 31, 1973.

The suit was upheld in U.S. District Court in October. Acting Attorney General Robert Bork decided not to appeal the reversal to the Supreme Court.

Stern had accused (**Broadcasting**, 10-1-73) the Justice Department of deliberately "stringing out the process" to discourage persons from filing suit for information under the act. His victory had taken 26 months of negotiation and litigation.

The Justice Department and Historians

Historians, meanwhile, were having as much trouble with the Justice Department's withholding information as had Stern. A directive had been issued during the brief tenure of Elliot Richardson as Attorney General which said (N.Y. **Times**, 11-12-73):

> Even though the Freedom of Information Act exempts some materials from mandatory public disclosure, historians should have access to material.
>
> Persons outside the executive branch engaged in historical research projects will be accorded access to information or material of historical interest contained within this department's investigatory files compiled for law enforcement purposes that are more than 15 years old and are no longer substantially related to current investigative or law enforcement activities, subject to deletions to the minimum extent necessary to protect law enforcement efficiency and privacy, confidences, or other legitimate interests of any person named or identified in such files.

As a result of the directive, files and records on such personalities as Alger Hiss, Whittaker Chambers, Julius and Ethel Rosenberg and Ezra Pound were theoretically open to historians and scholars.

Smith College professor and historian Allen Weinstein had sued in the spring of 1973 for access to the Rosenberg files. In September, 1973, FBI Director Clarence Kelley wrote to Weinstein and to Alvin H. Goldstein, a producer of television documentaries, outlining procedures they would have to comply with to get the Rosenberg files. Kelley also announced that a special three-man FBI team had been set up to handle information requests.

On Feb. 26, 1974, the New York **Times** reported that the FBI had failed yet to release any of the material from the Rosenberg file. Weinstein and Goldstein accused the FBI of delaying. The Bureau replied that information that might identify "or otherwise embarrass informers" had to be deleted.

Weinstein had also requested material on Alger Hiss. On January 28, 1974, he said (N.Y. **Times**, 1-28-74) that he had received only 17 pages of the 53,000-page file on Hiss. John H. L. Shattuck, the American Civil Liberties Union attorney representing Weinstein, threatened to go to court unless a substantial delivery was made within two weeks.

Meanwhile, Justice Department files on Ezra Pound, the eminent poet and critic who had been accused of treason for making pro-Mussolini broadcasts from Italy during World War II, had been turned over (N.Y. **Times**, 3-10-74) to a young Pound scholar, C. David Heymann. Heymann said he had received 12 volumes of 14 volumes that the FBI had compiled on Pound for his treason trial.

The files showed that Pound had worked for a puppet government set up for Mussolini by the Nazis in northern Italy.

Pound was arrested by the Americans in Italy in 1945 and was later judged mentally incompetent to stand trial. Let-

ters from Pound to Mussolini about propaganda and economic theories, and interviews with William Carlos Williams, Archibald MacLeish and other notables who knew Pound were in the files.

The FBI originally had told Heymann that the cost of reproduction of the files would be $600, but later they revised the estimate downward after receiving other requests for the same material.

If the Justice Department vacillated in releasing historical records to scholars, it did the same in another kind of case.

When acting FBI director L. Patrick Gray III testified before the Senate Watergate committee in the summer of 1973 he revealed that the FBI had been gathering "biographical data on major (congressional) candidates" since 1950.

A suit was filed (Columbia, Mo. **Missourian**, 12-4-73) by Ralph Nader's Center for the Study of Responsive Law on behalf of three New York Democratic congressmen, Rep. Edward I. Koch, Rep. Benjamin S. Rosenthal and Rep. Jonathan Bingham.

The FBI sent their lawyer, Alan Morrison, a letter saying that the congressmen would be given "maximum disclosure" of their files subject to restrictions of the FoI Act.

Congressional Action

The government and its agencies mounted an intense lobbying campaign against the FoI amendments the Congress was considering. Saloschin headed the lobbying campaign to enervate the bill during its tenure in committee. When the bill reached the Senate floor, Tom C. Korologos, a White House lobbyist, attempted to persuade senators to vote against the bill. [13]

The Justice Department complained that the limits on time of responses were too stringent and created the possibility that personnel would have to be taken from vital missions to handle information requests:

> FBI personnel should not be required to process every request within the prescribed time limits when their attention is urgently needed for . . . investigating hi-jackings or bombings of public buildings or other emergencies. [14]

The federal government is a vast and complex mechanism, Justice officials said. Records might be scattered in various places or in remote locations. More time than 20 days was needed to coordinate a search and learn who was responsible for documents requested. Rigid time limits were impracticable and would only serve to frustrate the intent of the act. [15]

L. Niederlehner, acting general counsel for the Defense Department, wrote in a letter to the chairman of the House Committee on Government Operations that his agency opposed in camera judicial reviews;

> No system of security classification can work satisfactorily if judges are going to substitute their interpretations of what should be given a security classification for those of the Government officials responsible for the program requiring classification. [16]

Despite agency pressure, the House of Representatives voted (Des Moines **Register**, 3-15-74) on March 14, 1974, to amend the 1966 FoI Act. The vote was 383 to 8. The amendments included judicial in camera review, a 10-day limit on responses to requests and a 20-day limit on replies to appeals. Rep. John Moss (D-Calif.), a prime mover in passing the original 1966 act, cited **Mink v. EPA** as reason for Congress to pass the amendments.

On May 16, 1974, Sen. Kennedy filed (**Congressional Record**) a unanimous report on behalf of the Senate Judiciary Committee recommending passage of the FoI Act as amended. This was not the Muskie bill, which had been identical to the Moorhead bill, but rather the bill that Kennedy had introduced in October of 1973.

Kennedy cited three major areas of failure in the 1966 act: bureaucratic delays, lack of judicial review of classification and lack of any way to make officials accountable.

"Finally, a new provision added to the FoI Act puts teeth into its requirements," he said. "It allows courts to impose disciplinary sanctions against federal officials who violate the act."

Nebraska Sen. Roman Hruska (R), minority leader on the subcommittee, supported the amendments that had come out of the committee, but on May 30, after the Senate had voted on the amendments, the situation had changed.

The Senate had not only passed the amendments that had been reported out of committee, but had adopted three amendments offered from the floor.

Sen. Muskie had proposed that the guidelines for judges to follow in determining whether national security was involved in a request should be deleted from the amendments. Muskie said the guidelines were too narrow and shifted the burden of proof for withholding away from the government.

Sen. Philip Hart (D-Mich.) proposed an amendment that placed the burden on the government of showing that disclosure of investigatory files would:

(1) interfere with law enforcement proceedings.
(2) deprive a person of a right to a fair trial.
(3) constitute an unwarranted invasion of personal privacy.
(4) disclose the identity of an informer.
(5) disclose investigative techniques and procedures.
(6) endanger the life or physical safety of law enforcement personnel.

Hruska warned his Senate colleagues that he objected to both amendments and would advise President Nixon to veto the bill.

A third amendment, proposed from the floor by Sen. Birch Bayh (D-Ind.) was adopted by voice vote (**Congressional Quarterly**, 6-8-74). Bayh's amendment provided for making available for general public inspection material of "general public concern."

Saxbe Reneges

On the heels of this freedom-of-information victory occurred a setback. The next day it was reported (St. Louis **Post-Dispatch**, 5-31-74) that Attorney General William Saxbe had reneged on a commitment to give a study of government secrecy wide latitude in its investigation. The study had been proposed by former Attorney General Elliot Richardson, whose policy of releasing historical data from FBI files had been carried out sporadically and reluctantly.

In February, 1974, Saxbe had promised Jerry N. Clark, a lawyer chosen to head the $300,000 team research project, that "neither the Justice Department nor other executive branch agencies could force the team to change its recommendations." The research team of 15 lawyers and political scientists was to compile the first comprehensive data on the information policies enforced through the

government, "particularly in such traditionally secretive agencies as the FBI."

Deputy Attorney General Laurence Silberman apparently convinced Saxbe that the Justice Department should retain some authority over the latitude of the study. In retrospect, Saxbe and Silberman felt that the grant of complete authority had been excessive and should be rescinded.

Throughout April, 1974, the Justice Department had attempted to renegotiate the agreement, unsuccessfully. Finally, on May 31, Clark resigned from the study.

Congressional Conference

On August 6, 1974, a joint House-Senate conference began (**Publisher's Auxiliary**, 8-10-74). deliberations on the FoI amendments, focusing on the Muskie and Hart amendments and on the provision in the House bill to require answers to access requests within 10 days and appeal answers within 20 days. The Senate bill permitted a delay of 40 to 50 days.

Two days later, on August 8, Richard Nixon announced his resignation from the Presidency, and the following day Gerald R. Ford became the 38th President of the United States.

Ford almost immediately requested (**Washington Post**, 8-14-74) Congress to delay action on the FoI amendments until he could review them.

As a result of Ford's letter, Kennedy moved to delay action on the bill a week to give Ford the opportunity to review the bill.

Meanwhile, the Justice Department, through Deputy Attorney General Silberman, hinted Ford might veto the bill. Silberman telephoned several House conferees to warn of a veto threat.

The **Washington Post** reported (8-14-74) that some senators

> . . . described the situation as a bluffing contest, in which the Justice Department knows that the sponsors want a bill badly enough to compromise if they must, but the congressmen know that President Ford, who has pledged an open administration, would find it difficult to justify a veto of a freedom of information bill.

On August 20 Ford sent a letter to Kennedy, explaining his objections to the bill. Kennedy read both Ford's letter and his and Moorhead's response into the **Congressional Record** (10-1-74).

One of Ford's points was "in regard to court-imposed punishment of bureaucrats who violate the law," that "placing in the judiciary the requirement to initially determine the appropriateness of an employee's conduct and to initiate discipline is both unprecedented and unwise." The committee agreed to a compromise, allowing the court to indicate by letter that an employe had "acted arbitrarily or capriciously" and permitting the Civil Service Commission to discipline officials after a proper hearing.

Ford also demurred on disclosing classified documents as a result of in camera review. He said that the courts had neither the "background nor expertise" to judge the impact of release of a classified document on national security grounds.

Kennedy's and Moorhead's response was that Ford's fears were unfounded, that the courts were not bound to in camera review except in cases in which the right to withhold is not clear-cut, and further that "the court may still request additional information or corroborative evidence from the agency short of an in camera examination."

Ford opposed the provision requiring the release of investigatory files unless they would constitute a "clearly unwarranted" invasion of privacy for two reasons.

Ford said that the provision might hamper effective law enforcement, and that a "clearly unwarranted" invasion of privacy might still not protect one's right to privacy as it ought to be.

The conference committee agreed to strike the word "clearly" from the bill. In response to Ford's first point, the committee adopted

> . . . language offered by Sen. Hruska to permit the withholding of the information provided by a confidential source to a criminal law enforcement authority during the course of a criminal or lawful national security intelligence investigation. The federal agency may, in addition, withhold the identification of the confidential source in all law enforcement investigations — civil as well as criminal.

The President finally objected to the collection of court fees by wealthy plaintiffs or corporations. Kennedy and Moorhead agreed to change the language so that payment of fees would depend on "prevailing judicial standards, such as the general public benefit arising from the release of the information."

The conference committee also approved a 10-day extension for special cases where an agency could not meet the deadline. Kennedy noted that the bill was backed by the ABA, the ACLU, and the American Political Science Association.

Hruska still objected to the unchanged provision on in camera inspection; although he and other minority members opposed the conference report, the Senate as a whole approved it.

The report was sent to the House for its approval. On October 7 the House passed (**St. Louis Post-Dispatch**, 10-8-74) the revised bill by a vote of 349 to 2, and sent it to the President.

The Veto

Ford vetoed the bill on October 17. In his veto message he said (**Congressional Quarterly**, 10-26-74) that a judicious review of files within the time limits of the bill was not possible, and he proposed more flexible criteria.

The judicial review of classified material, and the time limits on required responses as a whole, he found unacceptable.

Ford's veto prompted (**Editor & Publisher**, 10-26-74) intense lobbying for a congressional override of the veto. The American Society of Newspaper Editors, the National Newspaper Association, Sigma Delta Chi, and the Reporters Committee for Freedom of the Press, among others, criticized the veto.

Although some congressmen and the media questioned Ford's veto in light of his stated desire for a more honest and open administration than Nixon's, the most revealing insight came from J. F. terHorst, who had been Ford's press secretary for a month. TerHorst opined that the fault probably lay (**Washington Star**, 11-1-74) with Ford's advisers.

Ford had wanted a genuine compromise with the Congress on the bill and had instructed government agencies to work one out. "No serious efforts to work out a compromise were made by the Justice Department, the FBI, the Domestic Council or other administration agencies," terHorst wrote.

Attorney General Saxbe called the amendments "bad legislation."

Whether or not Ford was thwarted by holdover Nixonians, his veto stirred up editorial controversy throughout the country. [17] On November 20 the House voted 371 to 31 to override the veto.

The following day in the Senate, Kennedy urged (**Congressional Record**, 11-21-74) the "repudiation of the special anti-media, anti-public, anti-Congress secrecy of the Nixon administration" as well as bureaucratic secrecy in general.

Following floor debate, the Senate passed the bill, 65 to 27.

The Amendments Take Effect

The amended FoI Act took effect on February 19, 1975. That day the **Wall Street Journal** reported:

> Officialdom is looking to its defenses. The new law gives an agency 10 working days to make its first response to a freedom-of-information request, and some officials are preparing to fight for every minute. They have decreed that the clock doesn't start running until the letter reaches the right desk; time spent lost in the mail room doesn't count. To play the game, applicants are asked to write "freedom-of-information request" on the outside envelope.

Government agencies, most of whom opposed the bill, have found other methods of gaining time as well. One tactic to discourage requests is (**Nation**, 4-19-75) to demand from the requester a statement that he agrees to pay searching and copying costs in advance.

William G. Florence, a retired Washington bureaucrat who has requested several classified documents, has been told he must agree to pay fees.

Florence wrote a letter (3-3-75) requesting from the Office of the Assistant Secretary of Defense for Public Affairs access to a report entitled "Proceedings for the Symposium on Remotely Piloted Vehicles."

In a letter of reply dated March 4, 1975, Elritt N. Nettles of the Directorate of Freedom of Information of the Defense Office, told Florence that he must first state a willingness to pay the cost of searching for and copying the document.

Florence replied (3-10-75) that he only sought access, not necessarily a copy: decision on copying would come after examination. He then pointed out that a document classified secret (as the document was) must easily be accounted for according to

> section 6(e) of Executive Order 11625. If the document remains "classified" but has gotten out of the Presidentially prescribed accountability system, the Secretary of Defense has a heavy responsibility to find out where it is. I am certain that Congress did not authorize the Department of Defense to charge the cost of that search to me or any other requester.

Nettles' response (3-13-75) was that the documents Florence had requested were not available for public inspection under section 552(a)(2) of the United States Code. Nettles reiterated that Florence must agree to pay direct copying costs, which could amount to 716 pages ($37.50 at the agency's rate).

Nettles added:

> Your request is being processed. However, the time allotted for responding under the Act does not properly commence until you have stated your willingness to pay fees that may be associated with the direct cost of search and copy.

As of March 17, 1975, Florence was attempting still to persuade Nettles that there was "no legal basis for you to demand that a person who only requests that a record be made available for inspection also promise to pay the cost of copying it." [18]

The disparity among agency regulations is another impediment to obtaining information. The regulations vary in length (**Nation**, 4-19-75) from half a page at the Reconciliation Service of the Selective Service System to nine pages at the Defense Supply Agency. No standard form exists to request information from any government agency.

Attorney General Edward H. Levi indicated still other possible loopholes in February, 1975. Regarding the new language about reasonable identification of records, Levi wrote:

> It is not enough that the request provide enough data to locate the record; it must enable it to be located in a manner which does not involve an unreasonable amount of effort. [19]

Levi also noted that "segregable records" must be released if they are intelligible. If unintelligible, they are not logically segregable, he suggested.

Levi added, however, that certain language in the provision would indicate that some material — e.g., "conjunctions, prepositions, articles and adverbs" — are almost always technically segregable from material which cannot be disclosed. [20]

Levi's assertion that some requesters might legally receive a pastiche of meaningless words and punctuation for their search and copy fees was no news to historian Weinstein, who was still seeking information on the Hiss case.

Weinstein's attorney, John H. F. Shattuck, had been informed (N.Y. **Times**, 10-21-74) by Attorney General Saxbe, Levi's predecessor, that FBI director Clarence Kelley had been delegated the responsibility for releasing historical files. Saxbe's letter, dated October 10, 1974, was a reply to a March 14 letter from Shattuck. Saxbe said that Kelley had decided certain deletions had to be made "to protect the identities of informants, the privacy of individuals, law-enforcement techniques and the like." The release of reports with witnesses, Kelley also decided, would compromise the FBI's law enforcement capabilities and constitute invasion of privacy.

By November 21, Weinstein had received (N.Y. **Times**, 12-17-74) only 250 heavily-edited pages on Alger Hiss from a file of 53,000 pages. On December 4, Shattuck filed suit (N.Y. **Times**, 12-8-74) on Weinstein's behalf in Federal District Court, accusing the FBI of "arbitrary and discriminatory actions" in choosing what information to release. One copy of a letter Weinstein had received anticipated Levi's opinion. The FBI had deleted everything but "Dear Sir" and "Very truly yours, J. W. Chambers."

Summary

Three months after becoming effective, the 1974 amendments to the FoI Act appear to be prying loose information that hitherto would have been withheld.

Two major substantive changes — in camera review of

classification and sanctions against bureaucrats who capriciously withhold information — have put teeth into the act.

The time limits on replies to requests and the limits on fees have tightened bureaucratic impediment of the act. Officials have earnestly complained about the stringent time limits, perhaps with justification. Even Florence concedes that 20 days for response to initial requests and 10 days for answering appeals would have been a more reasonable rule.[21]

Impediments to obtaining information have not been completely eliminated by the new amendments. For one thing, the classification process remains the same, which means that overclassification may still occur as frequently as before. Suggestion has been made that Congress should take upon itself the power of classification, and the House Subcommittee on Government Information and Individual Rights (formerly the House Subcommittee on Government Information and Foreign Operations), now chaired by Rep. Bella Abzug (D-N.Y.), is looking into the matter.

A second obstacle may arise from the Privacy Act of 1974. Although the Hart amendment provided that investigatory files be open with six exceptions, FBI officials have indicated (**Editor & Publisher**, 2-22-75) that the Privacy Act may conflict with some FoI Act provisions. Officials are going to balance the right to know and the right to privacy. Ironically, both the Privacy Act and the tough new FoI Act provisions were in part results of Watergate. Watergate had shown secrecy to be the handmaiden of corruption. The FoI amendments were a tool to fight both.

The flood of requests that bureaucrats feared would follow implementation of the amended act has become (N.Y. **Times**, 5-14-75) a reality. The CIA has 50 men working on approximately 1600 requests received since Jan. 1. The FBI is averaging 113 requests a day and has 101 employes processing information requests. The Internal Revenue Service has received (Denver **Post**, 3-25-75) requests at double the 1974 rate.

The increased requests have already resulted in important releases of information. Morton Halperin, a former aide to Secretary of State Henry Kissinger and a former member of the National Security Council, now a scholar at the Center for National Security Studies, has obtained (N.Y. **Times**, 5-14-75) a transcript of Kissinger's background briefings to newsmen in Vladivostok, U.S.S.R., on November 25 and December 3, 1974. The briefings contained information on the Strategic Arms Limitation Talks between President Ford and Soviet Leader Leonid Brezhnev; of particular interest was a description of "how the agreement on ceilings for nuclear arms was reached and what it meant." Attribution of remarks made in background briefings to newsmen is customarily proscribed.

Mark B. Feldman, a State Department lawyer, said, "It had been determined that attribution to Mr. Kissinger could damage national security." Feldman added that "nothing in the (FoI) act requires us to either hold a background briefing or maintain a record." Transcripts are usually not made of such briefings unless a high government official is formally briefing a large press gathering. The State Department deleted only three of the transcript's 60 pages on national security grounds, but Halperin has filed suit (St. Louis **Post-Dispatch**, 5-1-75) under the FoI Act for those pages.

Halperin also has obtained (N.Y. **Times**, 5-14-75) a copy of an agreement between the FBI and the CIA on the respective jurisdictions of those agencies within the United States. Under the agreement, the CIA received the right to keep contact with foreign nationals in the United States, "supposedly to permit the CIA to recruit agents from emigres in the United States."

Halperin has also filed FoI suits (St. Louis **Post-Dispatch**, 5-1-75) for a list of national security study memoranda and national security decision memos from the National Security Council. He has sued CIA director William Colby for a copy of his report to President Ford on January 15, 1975, concerning domestic CIA surveillance. Another suit against Colby and Treasury Secretary William Simon asks for details of the CIA budget, which has always been subsumed in the budgets of other agencies.

Determined use of the new act can make it difficult for abuses of power such as domestic surveillance, wiretapping, secret foreign policy agreements and covert paramilitary operations to occur. The question is, aside from authors like Weinstein and Halperin, will the public and the media use the new act more than they did the old? No one is yet sure. If a seasoned bureaucrat like Florence has such difficulty in getting information under the amended act, how much more intimidating will it be for a citizen who has never before encountered the arcane, penumbral world of bureaucratic secrecy?

Nor is it certain that the media will make greater use of the act. Some observers believe (**Nation**, 4-19-75) that the press will have to change its attitude that news is a perishable item. Carl Stern, after all, showed that an important story could still be unearthed from long-buried information.

The FoI amendments are only a tool. In the long run it will be up to the media, to citizens' groups, and to individuals to use the new act consistently and doggedly to pry loose government secrets that have no business being secret.

FOOTNOTES

1. Carole Fader, "The FoI Act and the Media," **Freedom of Information Center Report** No. 303, May 1973.
2. Harrison Wellford, aide to Sen. Philip Hart (D-Mich.) and former senior staff counsel for Ralph Nader's Center for the Study of Responsive Law, has written, "The great majority of the cases brought under the Freedom of Information Act have been by private corporate interests which use the Act as a substitute for discovery. The second largest litigant class under the Act is the public interest community. The press has used the Act rarely, and the average citizen, without a Washington based organization to back him up, has used it hardly at all." ("Rights of People: The Freedom of Information Act," in **None of Your Business**, ed. Norman Dorsen and Stephen Gillers, New York: Viking, 1974, p. 196).
3. Title 5, U.S.C. 552, Sec. 4 (b).
4. **Ibid.**, Sec. 3.
5. Quoted in Robert L. Saloschin, "Administering the Freedom of Information Act: An Insider's View," in Dorsen and Gillers, eds., **op. cit.**, p. 192.
6. **Ibid.**, p. 193.
7. **Ibid.**, pp. 187-188.
8. Patsy T. Mink, "The Cannikin Papers: A Case Study in Freedom of Information," in **Secrecy and Foreign Policy**, ed. Thomas M. Franck and Edward Weisband (New York: Oxford University Press, 1974), p. 116.
9. **Ibid.**, p. 119.
10. **Ibid.**, p. 114.
11. **Ibid.**, p. 123.
12. Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book, Washington: United States Government Printing Office, 1975, p. 111.
13. Samuel Archibald, press release, FoI Institute, 6.11.74.
14. Letter from Malcolm D. Hawk, Acting Assistant Attorney General, to Hon. Chet Holifield, Chairman of House Committee on Government Operations, 20 February 1974, reprinted in **Freedom of Information Sourcebook**, p. 137.
15. **Ibid.**
16. Letter from L. Niederlehner, Acting General Counsel for the Department of Defense, to Hon. Chet Holifield, 20 February 1974, **Ibid.**, p. 144.
17. Examples may be found in the **Congressional Record — House**, November 20, 1974, and in **Congressional Record — Senate**, November 21, 1974. Excerpts of both are printed in the **Freedom of Information Sourcebook**.
18. Letter from William Florence to Elrift N. Nettles, March 17, 1975.
19. Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act," U.S. Department of Justice, February, 1975, p. 23.
20. **Ibid.**, p. 14.
21. Conversation, Freedom of Information Center, Columbia, Missouri, April 8, 1975.